ORIGINAL

BEFORE THE
FEDERAL MARITIME COMMISSION

PETRA PET, INC. (a/k/a PETRAPPORT) Complainant, v. PANDA LOGISTICS LIMITED; PANDA LOGISTICS CO., LTD. (f/k/a PANDA INT'L TRANSPORTATION CO., LTD.); and RDM SOLUTIONS, INC. Respondents.	:	Docket No. 11-14

PANDA LOGISTICS LIMITED AND PANDA LOGISTICS CO., LTD.'S (f/k/a PANDA INT'L TRANSPORTATION CO., LTD.) BRIEF IN SUPPORT OF POSITION AND RESPONSE TO PETRA'S BRIEF IN SUBMISSION OF CLAIMS FOR REPARATIONS AND DAMAGES.

David P. Street
Brendan Collins
GKG LAW, PC
Canal Square – Suite 200
1054 Thirty-First Street, NW
Washington, DC 20007
Telephone: 202.342.5220
202.342.6793
Email: dstreet@gkglaw.com
bcollins@gkglaw.com

Counsel for Respondents Panda Logistics Limited and Panda Logistics Co., Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

BEFORE THE
FEDERAL MARITIME COMMISSION

PETRA PET, INC. (a/k/a PETRAPPORT) Complainant, v. PANDA LOGISTICS LIMITED; PANDA LOGISTICS CO., LTD. (f/k/a PANDA INT'L TRANSPORTATION CO., LTD.); and RDM SOLUTIONS, INC. Respondents.	:	Docket No. 11-14

PANDA LOGISTICS LIMITED AND PANDA LOGISTICS CO., LTD.'S (f/k/a PANDA INT'L TRANSPORTATION CO., LTD.) BRIEF IN SUPPORT OF POSITION AND RESPONSE TO PETRA'S BRIEF IN SUBMISSION OF CLAIMS FOR REPARATIONS AND DAMAGES.

Respondents, Panda Logistics Limited ("Panda Logistics") and Panda Logistics Co., Ltd. (f/k/a Panda Int'l Transportation Co., Ltd.) ("Panda Int'l") (Panda Logistics and Panda Int'l are sometimes referred to herein together as "Panda") hereby submit their Brief in Response to Petra Pet, Inc.'s (a/k/a Petrapport) ("Petra") Brief in Submission of Claim for Reparations and Damages.

Petra seeks to insulate itself from its contractual obligation to pay freight and related charges to Panda, which acted as a non-vessel operating common carrier ("NVOCC") for the transportation at issue, on the grounds that it purportedly made such payments to a third party, RDM Solutions Inc. ("RDM"). Petra's argument fails because Petra cannot establish that RDM was acting as an agent for Panda. Indeed, the record reflects that RDM was acting as a freight forwarder and the overwhelming weight of legal authority establishes that a freight forwarder

acts on behalf of the shipper, not the carrier. Thus, Petra remains fully obligated to pay Panda for the transportation services rendered.

The most that Petra can show is that RDM was acting as an independent contractor with obligations to both Petra and Panda. The law is plain, however, that if a shipper chooses to make payments to an independent contractor – acting as a freight forwarder or other type of broker – rather than directly to the carrier itself, it remains obligated for payment to the carrier should the independent contractor fail to make such payment to the carrier. Such a conclusion is simply reinforced here, where Petra was on notice that payments to RDM would not be treated as the equivalent of payments to Panda and where Petra continued to make payments to RDM long after Panda had notified it that Panda was not being paid by RDM.

FINDINGS OF FACT

Panda's Proposed Findings of Fact, which are being filed separately pursuant to the Administrative Law Judge's Scheduling Order, are incorporated herein.

ARGUMENT

I. RDM is Petra's Agent

The sworn testimony of Betty Sun, Panda's Overseas Manager with direct knowledge of the case, as well as the contemporaneous documents, reflect that RDM was acting as the agent of Petra throughout the 10 year period that it arranged for international freight and transportation services on Petra's behalf. Indeed, Petra offers no plausible, or admissible, evidence to the contrary.

The record reflects that Mario Ruiz, as the principal of what is now RDM, contacted Panda approximately ten years ago asking it to quote rates for his customer, Petra. *See* Declaration of Betty Sun ("Sun Dec.") at ¶ 5, Panda Appendix 1. When Mr. Ruiz subsequently

formed other companies, including RDM, he again contacted Panda asking it to quote rates for his customers, including Petra. *Id.* at ¶¶s 8-10. In so doing, he informed Panda that his company would provide all of the services provided by a "freight forwarder." *Id.* at ¶ 9; *see also* Petra Appendix at 4.

A. Panda's Bills of Lading

The Terms and Conditions of Panda's bills of lading define the Carrier as the Panda company (Panda Logistics or Panda Int'l respectively) issuing the bill of lading and the Merchant as including the "shipper and the consignee." *See* Conditions of Carriage at Panda Appendix 2a, ¶ 1, Definitions (Panda Logistics) and Appendix 2b, ¶ 1, Definitions (Panda Int'l). The Conditions of Carriage provide that freight and charges shall be deemed fully earned on receipt of the Goods by the Carrier and shall be paid and be non-returnable. Appendix 2a at ¶ 13(Panda Logistics) and Appendix 2b at ¶ 13.1 (Panda Int'l). There is no dispute that the Panda bills of lading list Petra as the consignee. *See, e.g.*, Petra Appendix at 46.

The bill of lading is the fundamental contract between a shipper-consignee and the carrier and defines the parties' obligations thereunder. *See, e.g., Southern Pac. Transp. Co. v. Commercial Metals. Co.*, 456 U.S. 336, 342 (1982) ("The bill of lading is the basic transportation contract between the shipper-consignee and the carrier and its terms and conditions bind the shipper and all connecting carriers"); *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) (bill of lading states the terms of carriage, and serves as evidence of the contract for carriage); *Dorff v. Taya*, 194 A.D. 278, 185 N.Y.S. 174, 176 (Sup. Ct. App. Div. 1920) ("The law is well settled that the bill of lading is not a mere receipt for goods shipped, but is also the contract under which they are shipped, and that the terms thereof cannot be varied by extrinsic evidence of another prior contract in relation thereto"). Thus, by

the plain language of the contract that defines the relationship between the parties, Petra had an obligation to pay Panda for transportation services provided.

Moreover, the law is clearly settled that a consignee that accepts delivery of the goods "is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier." *Pittsburgh C.C. & St. Louis R.R. v. Fink*, 250 U.S. 577, 581, 40 S.Ct. 27, 63 L.Ed. 1151 (1919). *Accord, States Marine Int., Inc. v. Seattle-First Nat. Bank*, 524 F.2d 245, 248 (9th Cir. 1975), *A/S Dampskibsselskabet Torm v. Beaumont Oil Ltd.*, 927 F.2d 713, 717 (2d Cir. 1991); *Dare v. New York Cent. R.R.*, 20 F.2d 379, 380 (2d Cir. 1927) ("[i]t has been authoritively established that a consignee who receives the goods becomes legally bound to pay the freight charges."). The Commission follows these authorities. *Sea-Land Service, Inc. v. Acme Fast Freight of Puerto Rico*, 21 F.M.C. 501, 503 (1978) ("the consignee becomes liable. . . when an obligation arises on his part from presumptive ownership, acceptance of the goods and the services rendered and the benefits conferred by the carrier for such charges." *quoting, Arizona Feeds v. Southern Pacific Co.*, 519 P.2d 199, 21 Ariz. App. 346 (1974).[1] There is no question that Petra accepted the goods transported by Panda Logistics. *See* Sun Dec. at ¶ 19, Panda Appendix 1. Therefore, there is no question that Petra owes Panda the freight charges.

B. Contemporaneous Documentation

Not only the bills of lading but also the contemporaneous documentation reflects that Petra had a duty to pay Panda, not RDM, for transportation services provided.

From the beginning of their relationship, which extended for approximately ten years, Petra provided instructions to RDM as to how to handle Petra Shipments and paid freight charges to RDM, which then made payment to Panda on Petra's behalf. Sun Dec. at ¶ 14. RDM

[1] Further, as reflected below, the law is clear that the mere fact that the bill of lading directs that freight charges be billed to a third party is insufficient to excuse the consignee from its obligation to pay applicable freight charges. *See, e.g., Dare v. New York Cent. R.R.*, 20 F.2d at 380 and cases cited at pages 13 herein.

also acted as an advocate for shippers, such as Petra, complaining when Panda's services were deemed tardy. *See, e.g,* Petra Appendix at 3. When Mr. Ruiz left his employer and formed another entity, which subsequently became RDM, he again solicited business from Panda on behalf of Petra. *See* Sun Dec. at ¶ 10. At that time, Mr. Ruiz identified his new company as providing "freight forwarding" services. *See* Petra Appendix 4.

Petra was on notice for at least the last five years that its cargo was subject to being held by Panda or its affiliate for nonpayment even if it had paid RDM for such services. When in August of 2006, RDM failed to timely make payments on behalf of Petra for services provided by a Panda affiliate (Beijing Jaguar), Beijing Jaguar refused to release bills of lading in its possession and held cargo until it was paid freight and related charges. Sun Dec. at ¶ 25; *see also* August 22, 2006 email to Patty De Avila, the Office Manager of Petra, Panda Appendix 3. Only after RDM paid for the transportation services was Petra's cargo released. *See* Sun Dec. at ¶ 28.

Incredibly, when in July of 2010, Petra was informed by Panda that payment had not been received for transportation services rendered, Petra ignored the warning and continued to make payments to RDM without bothering to determine whether such payments were being forwarded to the carrier providing the services. Specifically, on July 26, 2010, Betty Sun of Panda sent an email to Patty De Avila, Petra's Office Manager, regarding overdue freight invoices. Sun Dec. at ¶ 31; *see also* July 26, 2010 email attached as Petra Appendix 28. In that email, Ms. Sun explicitly referenced the fact that Panda had large amounts of unpaid invoices and that Panda could no longer advance payments on Petra's behalf. *Id.* at ¶ 32; *see also* correspondence at Petra Appendix 28. Petra's response to that warning is noteworthy in two respects. If Petra believed, as it now contends, that RDM was Panda's agent, its natural response

would have been to tell Panda that its agent already been paid. Petra did not do that, however. [2] Instead, it sent a strongly worded message to RDM that it needed to pay Panda. *See* Petra Appendix 28 ("PLEASE NEED A REPLY TO [PANDA] WITH A PAYMENT . . . .")

Moreover, Petra took no meaningful follow up with RDM to guarantee that payments owed pursuant to Panda's bill of lading were paid. After receiving bland assurances from RDM that the matter would be taken care of, *see* Petra Appendix 28, Petra apparently never gave the matter another thought because even after being told that its invoices were not being paid, Petra continued to make payments to RDM in the apparent hope that such payments would find their way to Panda. *See, e.g.* Petra Appendix No. 23 showing a check dated October 4, 2010, from Petra to RDM – more than three months after being told by Panda that its invoices had not been paid.

It was only in December of 2010, after Panda refused to release goods in its possession until it was paid for transportation services provided, and after RDM disappeared, that Petra for the first time asserted that RDM was Panda's agent and that payment by Petra to RDM satisfied its obligations to Panda. Sun Dec. at ¶ 34. Petra had never previously made such assertion, even in 2006 when Petra had previously made payments to RDM and RDM failed to timely forward such payments to Beijing Jaguar or Panda. *Id.*

In light of the above, there is simply no credible evidence that RDM was acting as an agent for Panda or that Petra reasonably believed that it was acting in that capacity.

---

[2] Indeed, it is significant that Petra also did not take that position back in 2006 when its goods had been held up until RDM made overdue payments to Panda's affiliate.

II. Petra's "evidence" does not establish an agency relationship between Panda and RDM

The most that Petra can show is that the bills of lading issued by Panda in its capacity as a non vessel operating common carrier (NVOCC) listed RDM under the section entitled "Freight Amount" and that Panda billed RDM for payment. Neither of these even suggest, much less establish, however, that RDM was acting as Panda's agent or excuse it from its obligation to pay Panda for transportation services rendered. Indeed, as reflected below, courts have uniformly recognized that the mere fact that a bill of lading or other correspondence reflects that a third party is being billed for transportation services provided, does not insulate the shipper or consignee for liability for such payments absent an express release from the carrier.

The unauthenticated emails also relied upon by Petra do not support a conclusion that RDM was acting as Panda's agent. Petra notes that Mario Ruiz from RDM helped coordinate a trip to China by Petra and at least one of Petra's owners, in order to meet with Panda representatives. This is neither surprising nor probative, given that Panda was providing extensive transportation services for Petra and that Petra wanted to ensure that rush orders were handled expeditiously by Panda. The fact that RDM had a longstanding relationship with Petra made it logical that RDM would coordinate the trip and its logistics.

Further, Petra emphasizes that RDM requested that Panda not disclose its prices to Petra when they meet. Again, however, such an instruction is neither surprising nor probative. A party acting in RDM's capacity would not want the NVOCC to disclose to the shipper the rates the NVOCC is charging because of concerns that the customer would deal directly with the NVOCC. Sun Dec. at ¶ 31. Thus, that in no way evidences that Petra was Panda's agent. As discussed below, the overwhelming weight of authority establishes that if RDM was acting as a freight forwarder, as it represented, *see* Petra Appendix 4, it was an agent of the shipper, not of

Panda. Moreover, the law is clear that even if RDM was acting as an independent broker in making transportation arrangements between Petra and Panda, Petra still has an obligation to pay Panda for services rendered.

In a vain attempt to establish to establish an agency relationship between Panda and RDM, Petra refers to 2007 correspondence indicating that RDM had apparently obtained a license to act as an NVOCC. Petra Appendix at 11. RDM, however, was not acting as an NVOCC in its dealings with Petra. Indeed, the services provided by Mario Ruiz on behalf of Petra were the same from 2003 onward; arranging for the transportation of goods, which is the classic type of service rendered by a freight forwarder.[3] *See* Sun Dec. at ¶10.

Although the Commission's regulations overlap to a certain extent in regard to what type of services constitute freight forwarding as opposed to acting as an NVOCC, one clear line of demarcation is that an NVOCC issues bills of lading while a freight forwarder does not. *See, e.g,* 46 CFR Section 515.2(l) (4) (NVOCC issues bills of lading or equivalent documentation) versus 46 CFR Section 515.2(i).[4]

In the seminal case of *Prima U.S. Inc. v. Panalpina*, Inc., 223 F.3d 126, 129 (2d Cir. 2000), the Second Circuit drew a clear distinction between NVOCCs and freight forwarders, holding that while an NVOCC "is liable to the shipper because of the bill of lading that it issued . . ." "[a] freight forwarder simply facilitates the movement of cargo. . .."

---

[3] Acting as a forwarder on inbound shipments to the U.S. does not require a license from the Commission. See 46 C.F.R. §515.2(o)(1)(i) (ocean freight forwarder "dispatches shipments from the United States.")

[4] An NVOCC's services also may include: 1) Purchasing transportation services from a VOCC and offering such services for resale to other persons. 2) Payment of port-to-port or multimodal transportation charges: 3) Entering into affreightment agreements with underlying shippers: 5) Arranging for inland transportation and paying for inland freight charges on through transportation movements: 6) Paying lawful compensation to ocean freight forwarders: 7) Leasing containers: or 8) Entering into arrangements with origin or destination agents. 46 C.F.R. §515.2(l). RDM provided none of these services on behalf of Petra.

> Freight forwarders generally make arrangements for the movement of cargo at the request of clients and are vitally different from carriers, such as vessels, truckers, stevedores or warehouses, which are directly involved in transporting the cargo. Unlike a carrier, a freight forwarder does *not* issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the good being shipped.

Id. at 129 (emphasis in original).

Thus, in *Prima*, the court recognized that Panalpina was not an NVOCC because it "did not issue a bill of lading and it did not consolidate cargo." *Id., see also, Scholastic Inc. v. M/V Kitano*, 362 F. Supp. 2d 449, 455-56 (S.D. N.Y. 2005), ("the most fundamental difference between a freight forwarder and an NVOCC is that an NVOCC issues a bill of lading. . . . It is from the bill of lading -- the NVOCC's contract with the shipper – that its liability to the shipper for its cargo derives." *Id.* at 455-46 (citations omitted); *Strickland v. Evergreen Marine Corp.*, 2007 WL 539424 at * 4 (D. Or. 2007) (party was an NVOCC in its dealings with the plaintiff because it issued a bill of lading, which a freight forwarder would not do); *Fireman's Fund American Ins. Co. v. Puerto Rico Forwarding Co.*, 492 F.2d 1294, 1295 (1st Cir. 1974) ("As the carrier, an NVOCC issues its own bill of lading to each small shipper that employs its services, describing the goods for whose transportation it will be held responsible); *M. Prusman Ltd. V. M/V Nathaniel*, 670 F. Supp. 1141, 1143 (S.D. N.Y. 1987) (defendant was a common carrier because it issued a bill of lading which are contracts of carriage). In this case it is clear that RDM never issued bills of lading for the transportation of Petra's goods.

Petra also heavily relies upon an email from RDM to Panda in which it asks whether it can act as a co-loader for transportation services provided to Petra. *See* Petra Appendix at 15. Petra Appendix 15 merely reflects that Mario Ruiz, the principal of RDM, was attempting to regain the Petra business he had lost at that time and exploring the possibility of obtaining co-load rates from Panda that he could provide for his customer, Petra. The record is clear,

however, that at no point did RDM act as a co-loading NVOCC with Panda. *See* Sun Dec. at ¶ 21.

III. Payment to RDM Does Not Absolve Petra Of Its Obligation to Pay Panda for Transportation Services Rendered

As discussed above, there is nothing in the record establishing that RDM was acting as Panda's agent for the shipments at issue. Indeed, the record is to the contrary. The record shows that RDM was acting as a freight forwarder in its dealings with Panda and Petra, *see, e.g.*, Petra Appendix 4. The weight of authority reflects that a freight forwarder is deemed the agent of the shipper, not the agent of the carrier. Moreover, even if Petra could establish that RDM was an independent contractor, and thus acting as neither an agent of Petra or Panda, payment to an independent contractor does not absolve Petra of its obligation to pay Panda, acting as a carrier, for services rendered.

The Supreme Court in *United States v. American Union Transport*, 327 U.S. 437 (1946) analyzed the type of services provided by a freight forwarder, including arranging for necessary space with a carrier and preparing necessary documentation in regard to the cargo being shipped, and concluded that forwarders "act as agents of the shipper." *Id.* at 443. More recent cases have reached the same conclusion. Thus, in *Pearson v. Leif Hoegh & Co., A/S*, 953 F.2d 638, 1992 WL5020 at *5 (4th Cir. 1992), the Fourth Circuit analyzed the law in that regard and recognized that the weight of authority indicates that the freight forwarder is properly considered the shipper's agent. *See also, Ins. Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934, 940 (11th Cir. 1990) (freight forwarder is shipper's agent); *Hoechst Celanese Corp., v. M/V Trident Amber*, 1992 WL 179219 (S.D. Ga. 1992) (weight of authority from federal courts indicates that a freight

forwarder is properly considered the agent of the shipper, *citing* Second, Fourth and Eleventh Circuit precedent).[5]

In *Strachan Shipping Co v. Dresser Ind., Inc.*, 701 F.2d. 483 (5th Cir. 1983), the Fifth Circuit addressed the very question presented here, *i.e.* whether payment to a freight forwarder excuses a shipper from its obligation to pay a carrier for transportation service provided. The Fifth Circuit adopted a minority position and concluded, contrary to the authority above, that because a forwarder in the shipping industry assumes a unique position and performs a variety of functions that benefit both the shipper and carrier, it is neither an agent of the shipper or the carrier; instead, it is an independent contractor. *Id.* at 487-89. The court, nonetheless, held that payment to the freight forwarder did not excuse the shipper from its obligation to pay the carrier. That determination, the court reasoned, was not dependent upon whether the carrier extended credit to the forwarder or whether the carrier initially sought payment from the forwarder, but instead whether the carrier intended to release the shipper from its obligation and to look solely to the forwarder for payment. *Id.* at 489. If it did not, as was the case there, the shipper remained liable for payment to the carrier. In so holding, the court noted that its conclusion comports with economic reality.

> A freight forwarder provides a service. He sells his expertise and experience in booking and preparing cargo for shipment. He depends upon the fees paid by both shipper and carrier. He has few assets, and he books amounts of cargo far exceeding his net worth. Carriers must expect payment will come from the shipper, although it may pass through the forwarder's hands. While the carrier may extend credit to the forwarder, there is no economically rational motive for the carrier to release the shipper. The more parties that are liable, the greater the assurance for the carrier that he will be paid.

Id. at 490.

---

[5] The fact that Petra was consignee in this case, rather than the shipper, does not diminish the authority of these cases. RDM was performing its freight forwarding services for its client, Petra, (*see,* e.g. Petra Appendix 28, in which RDM refers to Petra as its client). RDM did nothing for Panda, not even preparing Panda's bills of lading. RDM, therefore, clearly acted as the agent of Petra

In *National Shipping Company of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544 (11th Cir. 1997), the Eleventh Circuit similarly concluded that the shipper is liable unless released by the carrier. *Id.* at 1546-47. The court recognized that the weight of authority and the better reasoned authority reflects that "unless the carrier intends to release the shipper from its duty to pay under the bill of lading, the shipper remains liable to the carrier, irrespective of the shipper's payment to a freight forwarder." *Id.* at 1546. Thus, the court concluded that "[s]hould the shipper wish to avoid liability for double payment, it must take precautions to deal with a reputable freight forwarder or contract with the carrier to secure its release." *Id.* at 1547.

The Fourth Circuit reached the same conclusion in *Hawkspere Shipping Co. Ltd. v. Intamex, S.A.*, 330 F.3d 225 (4th Cir. 2003). There, again, the court addressed a dispute between a carrier that asserted a maritime lien based upon the shipper's failure to pay freight charges. Just as here, the shipper defended against the seizure on the grounds that it made payment to a freight forwarder (ICTS), which it asserted, was acting as the carrier's agent. In rejecting the defense, the court recognized that the shipper has the burden of proof in establishing that there is a principal-agent relationship between the carrier and the forwarder. *Id.* at 235. Absent a formalized agency relationship between the parties, the shipper has to establish that the carrier has held out the forwarder as someone authorized to act on its behalf. *Id.* at 235-36. The mere fact that the carrier looked to the forwarder for payment falls far short of such a showing.

> That [the carrier] did so so, though, demonstrates nothing more remarkable than the fact that the fielding of payments was one of the services that ICTS chose to provide to the shippers for whom it consolidated. Its provision of that service in no way indicates that it was acting as [the carrier's] collection agent.

Id. at 236.

The court further rejected the shippers' testimony as to its belief that the forwarder was acting for the carrier and that it relied upon that belief. "Under United States law, however, the Shippers' subjective beliefs are irrelevant to the inquiry; only evidence of [the carrier's] conduct can prove agency." *Id.*

After weighing the authority, the court concluded that shippers assume the risk that they may have to pay twice for transportation services when they choose to pay a freight forwarder rather than pay the carrier directly. "[W]e here adopt the assumption of risk approach. Shippers . . . can always avoid the loss simply by paying their carrier directly. When, as here, they choose not to do so, it is they who appropriately bear the risk that such a choice creates." *Id.* at 237.

Courts have reached the same conclusion in cases where the bill of lading directed that payment would be made by a freight forwarder or other third party. Thus, in *Oak Harbor Freight Lines Inc. v. Sears Roebuck &Co.*, 513 F.3d 949, 953, 956-57 (9th Cir. 2008), the Ninth Circuit held that the fact that "bill to" section of bill of lading reflected "Bill to Third Party" did not excuse consignor's payment obligation because a shipper cannot insulate itself from liability for payment of freight charges by the simple act of using a broker. *See also, Mo. Pac R.R. Co. v. Cent. Plans Indus., Inc.*, 720 F.2d 818, 819 (5th Cir. 1983) (fact that bill of lading states "Send Freight Bill To" third party is insufficient to relieve shipper or consignee from liability for freight charges); *Dare v. New York Cent. R.R.*, 20 F.2d 379, 380 (2d Cir. 1927) (mere fact that the bill of lading directs that freight charges be billed to a third party is insufficient to excuse the consignee from its obligation to pay applicable freight charges); *Shipco Transport, Inc. v. Cyclo Ind., LLC*, 2007 WL 988884 (S.D. Fla. 2007) * 3 (equitable estoppel not valid defense to double payment obligation of shipper to NVOCC).[6]

[6] A number of courts have held that a carrier is estopped from seeking payment from a shipper that has already paid the freight charges to a third party (usually the seller of the goods) in reliance on a bill of lading that states that

Here, the same conclusion is warranted despite Petra's unsubstantiated assertion that it made freight charges payments to RDM. RDM and Petra had a longstanding relationship in which RDM arranged for transportation on Petra's behalf. RDM approached Panda and asked it to quote rates on behalf of its client, Petra. Included among the duties that Petra delegated to RDM, was the fielding of payments to carriers. Under these circumstances, Petra simply cannot meet its burden of proof in establishing that RDM was Panda's agent, indeed, the evidence is flatly to the contrary, *i.e.*, that RDM was Petra's agent.

The most that Petra can show is that RDM was acting as an independent contractor on the shipments in question, providing services that benefited both the shipper and the carrier. At no point did Panda hold RDM out as its agent. Thus, Petra simply cannot establish that it was justified in believing that payments to RDM satisfied its contractual obligation to pay Panda for transportation services provided. Indeed, for at least the last five years Petra was on express notice that Panda and its affiliated companies would not release Petra cargo in its possession until payments made to RDM were actually received by Panda. *See* Panda Appendix 3. Further, Petra simply cannot establish it justifiably believed that payments made to RDM were being treated as the equivalent of payments to Panda. When Panda expressly informed Petra in July of 2010 that payments for transportation services had not been received and payment terms would no longer be advanced, Petra continued to make payments to RDM rather than making such payments directly to Panda. In so doing, Petra clearly assumed the risk that it might be liable for double payments should RDM not forward such payments to Panda.

---

freight has been prepaid, *e.g. Mediterranean Shipping v. Elof Hansson, Inc.*, 693 F.Supp. 80, 84-85 (S.D.N Y. 1988). Here, no such reliance would be justified given that the bills of lading stated "freight collect." *See e.g.*, Panda bills of lading at Petra Appendix 19, 20, 21, 22 and 23.

CONCLUSION

As the consignee on Panda bills of lading, Petra assumed the obligation to pay Panda for transportation services provided. The fact that Petra may have chosen to pay RDM rather than pay Panda, does not excuse it from its obligation to pay Panda as the NVOCC that provided the transportation. Such a conclusion is only reinforced by the fact that Petra was aware for at least the last 5 years that payment to RDM did not satisfy its obligation to Panda or its affiliates. The fact that Petra chose to continue to pay RDM, even after Panda expressly informed it that it had not been paid for the transportation services it provided, also belies any argument that Petra justifiably believed that payment to RDM satisfied its payment obligations to Panda.

Respectfully submitted,

David P. Street
Brendan Collins
GKG LAW, PC
Canal Square – Suite 200
1054 Thirty-First Street, NW
Washington, DC 20007
Telephone: 202.342.5220
202.342.6793
Email: dstreet@gkglaw.com
bcollins@gkglaw.com

DATED: June 15, 2012

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document and the Panda Respondents Appendix to the following addressees at the addresses stated by overnight delivery and/or via email transmission, this 15th day of June 2012:

Robert D. Stang
Sanford M. Saunders
GREENBERG TRAURIG, LLP
2101 L Street NW, Suite 1000
Washington, DC 20037
Email: stangr@gtlaw.com
saunderss@gtlaw.com

Attorneys for Petra Pet Inc.

Warren Hirsch (CPA)
65 Roosevelt Avenue
Valley Stream, NY 11581-1151
Email: whirsch28@aol.com

Agent designated for service of process for RDM Solutions, Inc.